Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOSEPH G. DoPADRE,

Petitioner

VS.

ANNA G. DoPADRE,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE JUDGMENT OF THE SUPREME COURT OF ARIZONA FAILED TO GIVE FULL FAITH AND CREDIT TO THE JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT AS REQUIRED BY THE DOCTRINE OF *RES JUDICATA*

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Jurisdictional Grounds

The order of the Supreme Court of Arizona denying discretionary review was entered on June 24, 1994. There are no orders respecting rehearing or extensions of time within which to file a petition for writ of certiorari.

Statutory Authority

Jurisdiction is conferred upon this Court to review the decision of the Supreme Court of Arizona by 28 U.S.C. Section 1257 by application for writ of certiorari in a civil case after rendition of the judgment of the highest court of a state.

Constitutional Provisions, Statutes and Regulations Involved in this Case

United States Constitution

Article IV, §1

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect there.

Article VI(2)

This constitution, and the laws of the United States which shall be made in pursuance thereof; and the treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Statutes[1]

11 U.S.C. Sec. 524 (Bankruptcy Code)

Effect of Discharge

(a) A discharge in a case under this title-

[1]The complete text of the listed Statutes, other than 11 U.S.C. §524, is set forth in the Appendix.

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under §727, §944, §1141 or §1328 of this title, whether or not discharge of such debt is waived.

(2) operates as an injunction against the commencement or continuation of an action, in the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; ....

11 U.S.C. Sec. 523
11 U.S.C. Sec. 544
11 U.S.C. Sec. 101(4),(9),(11),(30),(31)
11 U.S.C. Sec. 102(2)
Arizona Revised Statues §25-327(A)
Arizona Rules of Civil Procedure 60(c)(6), 16 A.R.S.

STATEMENT OF THE CASE

Petitioner JOSEPH G. DoPADRE and Respondent ANNA G. DoPADRE were divorced by decree of dissolution of marriage entered in the Superior Court in and for the County of Cochise, Arizona on July 13, 1987. In the Superior Court's original decree of dissolution of marriage, the trial court awarded to Petitioner JOSEPH G. DoPADRE his military and civil service retirement benefits in their entirety. Specifically, the trial court found at paragraphs 12 and 13 as follows:

> 12. That with regard to the two retirement plans of Respondent, and in keeping with the holding in *Koelsch v. Koelsch,* the Respondent (Joe DoPadre) is awarded his military retirement benefits in their entirety, the present value of which is $118,000.00 and to which Petitioner would otherwise be entitled to 46%. The other plan, Respondent's civil service retirement, which has a present value of $101,022.00, is also awarded to

> Respondent. In view of the above disposition of community assets, the Petitioner is awarded the sum of $75,000.00. Respondent shall satisfy this award to Petitioner by monthly payments over a period of fifteen years, with simple interest at the rate of 9%. Respondent shall secure the amount owed by the Petitioner by a life insurance policy with a face amount equal to the decreasing balance of the debt owed to Petitioner. Petitioner shall be the sole irrevocable beneficiary until the $75,000.00 has been paid in full.
>
> 13. That neither party shall pay spousal maintenance to the other.

The full text of the decree is set forth in the Appendix. (App. at A-1) Appellee ANNA G. DoPADRE was aggrieved by this ruling and appealed to the court of appeals on the basis that the trial court had abused its discretion in not awarding her spousal maintenance or a specific interest in the retirement plans. In response to this point of error, the Court of Appeals of Arizona stated:

> ANNA argues that it is conceivable that JOSEPH could avoid payment of the $75,000.00 by filing bankruptcy at some future time, and accordingly, that her interests in the pension funds would be better protected if the trial court had awarded her an actual interest in the pension funds. However, the trial court provided reasonable safeguards for ANNA's receipt of the $75,000.00 sum and was not required to take into account every speculative possibility. Our supreme court in *Koelsch* specifically approved the use of installment payments when lump sum distribution is impractical at dissolution.

DoPadre v. DoPadre, 156 Ariz. 30, 749 P.2d 939 (App. 1988). The court of appeals accordingly affirmed the judgment of the trial court in all respects and the judgment became final (Appendix, p. A-6).

Petitioner JOE DoPADRE subsequently moved to Texas and filed a petition for relief under Chapter 7 of the United States Bankruptcy Code on April 5, 1989 (Appendix, p. A-16). One of the debts

which JOE listed to be discharged was the note in the amount of $75,000.00 awarded to ANNA in the original decree of dissolution of marriage. In response, Appellee in due course filed her complaint objecting to the dischargeability of this debt on the grounds that (1) JOE's bankruptcy was filed only to avoid payments to her under the decree of dissolution, and (2) that such obligation was a debt to a former spouse in connection with a divorce decree that was actually in the nature of alimony, maintenance, or support and therefore nondischargeable pursuant to 11 U.S.C. Sec. 523(a)(5) (Bankruptcy Code). Her complaint was filed as an adversary proceeding in JOE's bankruptcy proceeding on July 18, 1989 (Appendix, p. A-19).

After full adversarial trial on the merits to the bankruptcy court, ANNA's complaint was overruled and JOE's debt to

her arising from the Arizona decree of dissolution of marriage was declared dischargeable by judgment dated March 19, 1990 (Appendix, p. A-27). In connection with this judgment, the United States Bankruptcy Court made findings of fact and conclusions of law on the same date (Appendix, p. A-29). Applying federal law, the court stated, "under the totality of the circumstances, it appears that the $75,000.00 in payments to Plaintiff (Anna G. DoPadre) ordered under the divorce decree was intended by the state court as property equalization payments, rather than support or alimony payments, and is, therefore, dischargeable under Section 523." See Appendix, p. A-38. As further noted in the conclusions of law of United States Bankruptcy Judge Robert C. McGuire, the court made it clear that it was applying federal law and analyzed no less than

fourteen separate factors commonly considered by bankruptcy courts in determining whether a particular obligation arising from a decree of divorce is in the nature of a nondischargeable support obligation or a dischargeable property equalization obligation. After careful analysis, the United States Bankruptcy Court concluded that the Plaintiff therein had failed to meet her burden of proof to show that the structured payments pursuant to the decree of dissolution of marriage were in the nature of support or maintenance, and accordingly rendered its judgment declaring ANNA DoPADRE's claim dischargeable. ANNA DoPADRE did not appeal from this judgment and it became final in due course.[1] It is the failure of the Supreme Court of Arizona to give

[1]At this time, JOE had already received his discharge on August 22, 1989 (Appendix, p. A-25).

full faith and credit to this federal court judgment which is the basis of Petitioner's application for certiorari.

At no point during the bankruptcy proceedings did ANNA DoPADRE: (a) file any proof of claim; (b) seek any extension of time to file a proof of claim; (c) seek leave to file any late proof of claim; (d) seek relief from the automatic stay in order to prosecute further claims in the state court divorce action; (e) take any further steps to prosecute the state court divorce action; (f) seek to have the bankruptcy court make any determination as to her equitable rights in any property of the debtor or property of the estate; (g) file any objection to debtor's discharge in general. Instead, she elected to stand on her rights flowing from the original decree of dissolution of marriage as they stood at the time JOE's

bankruptcy was filed, and prosecuted her claim that JOE's debt to her pursuant to such decree was nondischargeable, albeit unsuccessfully.

Almost two years later, Respondent ANNA DoPADRE returned to the Superior Court in and for Cochise County, Arizona and filed a motion for relief from decree of dissolution of marriage, seeking to reopen the judgment pursuant to Rule 60(c)(6) of the Arizona Rules of Civil Procedure, 16 A.R.S. Her sole basis for seeking to reopen the decree of divorce was that JOE's act of discharging his obligation to her in bankruptcy rendered the original decree of dissolution of marriage inequitable, and that the decree should therefore be reopened to award her a specific interest in the two retirement plans.

JOE filed his "Response To Motion For Relief From DECREE OF DISSOLUTION OF

MARRIAGE" in due course and interposed a plea of *res judicata* by way of affirmative defense, specifically bringing to the trial court's attention the judgments rendered by the United States Bankruptcy Court. The case proceeded to trial, where JOE presented as evidence in support of his affirmative defense certified copies of the following pleadings from the bankruptcy proceeding: (a) ANNA's complaint objecting to dischargeability of debt; (b) JOE's answer to the complaint; (c) the bankruptcy court's findings of fact and conclusions of law; (d) the bankruptcy court's final judgment; (e) JOE's voluntary petition in bankruptcy; and (f) the bankruptcy court's order of discharge. The Arizona trial court rendered its judgment on June 28, 1993 reopening the original decree of dissolution of marriage and awarded ANNA

DoPADRE a 46% interest in JOE's United States Military retirement, and 50% of JOE's United States Civil Service retirement benefits. Moreover, it rendered this judgment "nunc pro tunc to the Date of original decree," (July 13, 1987). In support of its judgment, the state trial court made the following findings of fact and conclusions of law:

> 9. The discharge of the promissory note to Petitioner, as debt, by the bankruptcy court was correct and pursuant to law;
>
> 10. The above discharge also rendered meaningless this court's equitable division of community property and therefore provides equitable reasons to allow the reopening of the previous decree pursuant to Rule 60(c)(6) Arizona Rules of Civil Procedure and A.R.S. §25-327(A);
>
> 13. This court concludes that Petitioner's requested relief from the decree of dissolution does not seek to upset the decisions previously made by the Arizona Court of Appeals nor the bankruptcy court; and Respondent's (JOE's) arguments

> of *res judicata* and inappropriate use of Rule 60(c) as an alternative to appeal do not apply;
>
> 15. Respondent's unilateral and voluntary action in seeking to discharge his obligation to Petitioner justifies the application of A.R.S. §25-327(A) and Rule 60(c)(6), Arizona Rules of Civil Procedure. (See Appendix, p. A-47).

In due course, JOE perfected his appeal to the Arizona Court of Appeals, assigning as error in Appellant's Opening Brief that the motion to reopen the original divorce decree is barred by the doctrine of *res judicata*. In a memorandum decision not for publication dated December 28, 1993, the Arizona Court of Appeals affirmed the trial court's judgment, holding:

> The husband argues that our opinion affirming the original decree of dissolution, *DoPadre v. DoPadre*, 156 Ariz. 30, 749 P.2d 939 (App. 1988), and the final judgment of the United States Bankruptcy Court in Texas deciding that the debt

> reflected by the husband's note was dischargeable bar the Rule 60(c)(6) motion for relief. We disagree and hold that the facts as found by the trial court after hearing fall well within the requirement that one must show a judgment is unjust because of extraordinary circumstances in order to justify the reopening the property provisions of the original decree pursuant to A.R.S. §25-327(A) and Ariz.R.Civ.P. 60(c)(6), 16 A.R.S. (Appendix, p. A-56, 60).

JOE then filed a Petition for Review by the Arizona Supreme Court, assigning as error that ANNA's motion to reopen the judgment is barred by the doctrine of *res judicata*. The Supreme Court of Arizona denied JOE's petition for review without opinion by order dated June 24, 1994. (Appendix, p. A-63)

JOE seeks review in this Court by Petition for Writ of Certiorari in order to vindicate his right to an effective discharge under the Bankruptcy Code (see 11 U.S.C. §524(a)) by requiring the

courts of Arizona to give full faith and credit the judgments of the United States Bankruptcy Court.

ARGUMENT

THE FAILURE OF THE ARIZONA COURTS TO ACCORD FULL FAITH AND CREDIT TO THE JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The foregoing statement of the case indicates that Respondent ANNA G. DoPADRE invoked the jurisdiction of the United States Bankruptcy Court in order to have her claim declared nondischargeable pursuant to 11 U.S.C. Sec. 523(a)(5). In her complaint objecting to discharge, it is apparent that she was seeking to enforce JOE's obligation to her which had arisen as a result of the Arizona decree of dissolution of marriage. At no time did she alert the bankruptcy court that she claimed any equitable interest in the

retirement plans which were property of JOE's bankruptcy estate or move in the bankruptcy court for relief from the automatic stay in order to establish such a claim. Instead, she elected to adjudicate her claim arising from the decree of dissolution of marriage, and when this claim was declared dischargeable, to return to the state courts of Arizona in order to prosecute a claim for equitable distribution of assets by reopening the Arizona decree.

The refusal of the Arizona courts to accord res judicata effect to the judgment of the United States Bankruptcy Court raises serious questions concerning the administration of the bankruptcy laws and the well-ordered functioning of the judicial system under principles of federalism. Specifically, if the judgment of the Supreme Court of Arizona is allowed to stand, then state courts

will have been allowed to deny the debtor a fresh start as envisioned by the bankruptcy code despite the judgment of the United States Bankruptcy Court that his debt to Respondent is dischargeable, by the simple expedient of recharacterizing her claim as a right to equitable distribution of marital assets. Respondent could and should have presented her claim for equitable distribution to the bankruptcy court, but failed to do so, and her claim was thereafter forever barred by the principle of res judicata.

The bankruptcy tribunal is a federal district court of authority and power. Its judgments are final and immune to collateral attack; if the judgment is final and valid it should be given appropriate res judicata effect in a state court and is entitled to full faith and credit. *Stoll v. Gottlieb*, 305 U.S.

165, 59 S.Ct. 134, 83 L.Ed. 104 (1938); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 80 L.Ed. 329 (1940).

The *Chicot County* case vividly demonstrates the central tenet of the doctrine of res judicata that a judgment operates as a bar -- prevents litigation of *all* grounds for, or defenses to, recovery that were *then available* to the parties before the particular court rendering the judgment in relation to the same claim -- *regardless of whether all grounds for recovery or defenses were judicially determined*. In *Chicot County*, the decree of a United States bankruptcy court confirmed a plan of composition under the original Chapter IX of the Bankruptcy Act, Municipal Debt Readjustments. That decree made certain provisions for the bond holders of the Chicot County Drainage District and

canceled the bonds. Subsequently in litigation between other parties in a different proceeding instituted in a bankruptcy court in Texas, the Supreme Court held that Chapter IX was unconstitutional. Subsequently, certain bond holders of the Chicot County Drainage District who had not appeared in the bankruptcy proceeding, although they had due notice thereof, brought an action at law against the drainage district on their bonds in the same federal district court which had earlier confirmed the bankruptcy composition. The drainage district pleaded the composition decree in bar by raising the affirmative defense of res judicata and was upheld by the Supreme Court. Chief Justice Hughes, speaking for the Court in the *Chicot* case, stated:

> The circuit court of appeals observed that no question had been raised as to the

regularity of the court's action. The answer in the present suit alleged that the plaintiffs (respondents here) had notice of the proceedings and were parties and the evidence was to the same effect showing compliance with the statute in that respect. As parties, these bond holders had full opportunity to present any objections to the proceedings, not only as to its regularity, or the fairness of the proposed plan of readjustment, or the propriety of the terms of the decree, but also as to the validity of the statute under which the proceeding was brought and the plan put into effect. Apparently no question of validity was raised and the cause proceeded to decree on the assumption by all parties and the court itself that the statute was valid. There was no attempt to review the decree. *If the general principles governing the defense of res judicata are applicable, these bond holders, having the opportunity to raise the question of invalidity, were not less bound by the decree because they failed to raise it.* (Citations omitted)... [It is a] well-settled principle that res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier

> proceeding, 'but also as respects any other available matter which **might have been presented** to that end.' (Emphasis added). Id., 308 U.S. 371, at 374-378.

Applying these principles to the case at bar, it is important to note that Respondent ANNA DoPADRE voluntarily availed herself of the opportunity to have JOE's debt to her arising from the Arizona decree of dissolution by filing her complaint objecting to the dischargeability of the debt, and fully participated in the proceeding through trial on the merits. Thus, that she submitted herself to the in personam jurisdiction of the United States Bankruptcy Court and that she had notice of the proceedings are axiomatic.

The Bankruptcy Code defines "debt" as liability on a claim. 11 U.S.C. §101(11). A "claim" is defined very broadly as: (A) right to payment, whether

or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. 11 U.S.C. §101(4). And significantly, the Code requires that a "claim against the debtor" be construed as a claim against *property* of the debtor. 11 U.S.C 102(2).

THE NATURE OF MRS. DOPADRE'S CLAIM IN BANKRUPTCY

Mrs. DoPADRE's claim for equitable distribution of marital property is *at*

most[2] a statutory right granted to spouses under Arizona law in the nature of a "species of common ownership" insofar as it ultimately derives from community property rights under Arizona law. See A.R.S. §25-327(A); Ariz. R. Civ. P., Rule 60(c)(6).

In the bankruptcy court, such an equitable claim for distribution of marital property constitutes a general unsecured claim which was discharged along with JOE's other debts. *Perlow v. Perlow*, 128 B.R. 412 (E. D. N.C. 1991). In determining the nature of the classification of such a claim, the U.S.

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[2]This argument probably assumes too much. Mrs. DoPadre's claim in the bankruptcy court was based upon the original decree of dissolution of marriage which had been final for almost two years at the time of JOE's voluntary petition in bankruptcy. Thus the existence and validity of Mrs. DoPADRE's claim, *as it existed on the date of JOE's voluntary petition in bankruptcy* was itself res judicata in the bankruptcy court. *Heiser v. Woodruff*, 327 U.S. 726, 66 S.Ct. 853, 90 L.Ed. 970 (1946).

District court in *Perlow* stated as follows:

> Ms. Perlow's claim for equitable distribution of marital property... does not, as Ms. Perlow contends, create a property right in the marital property (Citation omitted). Nor does the fact of separation create a lien on specific marital property in favor of the spouse. Rather, it only creates "a right to an equitable distribution of that property, whatever a court should determine that property is." Such a "right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured" qualifies as a "claim" against the estate pursuant to the code definition of the term. 11 U.S.C. §101(5)(A). Therefore, Ms. Perlow's right to equitable distribution is a general unsecured claim and Mr. Perlow properly listed it as a debt against the estate. 11 U.S.C. §101(12) (" 'debt' means liability on a claim").
>
> *Perlow v. Perlow*, 128 B.R. at 415.

Clearly, ANNA DoPADRE's general unsecured claim for equitable distribution was

discharged along with JOE's other debts on the date of his discharge. *Perlow*, 128 B.R. at 416. Under principles of res judicata, it may not be relitigated in the Arizona courts.

The *Perlow* case involved a situation where the parties' divorce was pending at the time the husband filed for relief under Chapter 7 of Title 11 of the United States Bankruptcy Code; therefore, the parties' marital estate had not yet been equitably divided by the state trial court. The wife, though aware that her claim was listed as a debt and was likely to be discharged, failed to object to the husband's discharge generally, to request relief from the automatic stay in order to continue the state court divorce action, or to request that the bankruptcy court abstain from exercising its jurisdiction over the matter pursuant to 28 U.S.C. §1334(c)(1). She took no

action whatsoever in the bankruptcy court, then attempted to obtain distribution of the marital property in state court after the bankruptcy was concluded. The husband promptly filed an adversarial proceeding in the bankruptcy court to determine the dischargeability of the claim. The federal district court noted that any vested interests in marital property which the wife had were cut off by the filing of the bankruptcy petition and that therefore Ms. Perlow's rights in *specific* marital property were cut off by the bankruptcy filing pursuant to 11 U.S.C. §544. Under that provision, the trustee in bankruptcy is clothed with the status of a hypothetical lien creditor and a hypothetical bona fide purchaser of property from the debtor and may thus avoid such rights which were not perfected as of the date of bankruptcy filing. Presumably, the same analysis

would be applied to ANNA DoPADRE's general unsecured claim to specific assets of JOE's bankruptcy estate pursuant to Rule 60(c)(6) of the Arizona Rules of Civil Procedure.

In the case before the Court, an even stronger case exists for application of the rules announced in *Perlow*. First, the wife in *Perlow*, although she had notice of the bankruptcy proceeding, took no action whatsoever in the bankruptcy court and subsequently attempted to obtain distribution of marital property in the divorce action which was pending at the time of the petition in bankruptcy. In the case at bar, Mrs. DoPADRE, undoubtedly aware of the risk that her claim arising from the decree of dissolution was subject to discharge, actually initiated the complaint objecting to the dischargeability of her claim during the course of the bankruptcy

proceedings and prior to discharge. Secondly, since the basis of ANNA's claim in the bankruptcy court derived from the decree of dissolution which was a final judgment declaring JOE to be the sole owner of the retirement plans as of the date of the bankruptcy petition, it obviously became extremely important that she request relief from the automatic stay in order to continue (recommence) the state court action for equitable distribution, or request that the bankruptcy court abstain from exercising its jurisdiction over the matter pursuant to 28 U.S.C. §1334(c)(1). This inaction on the part of Mrs. DoPADRE in the bankruptcy court distinguishes it from the typical case where the bankruptcy court grants relief from the stay in order for a state lawsuit involving the division of marital property to proceed *during the pendency of the bankruptcy*

action, not after it was completed. Perlow v. Perlow, 128 B.R. at 416. In *Perlow*, the wife failed to object to the husband's discharge or request relief from the automatic stay in a timely manner, resulting in her general unsecured claim for equitable distribution being discharged along with all other debts. In the instant case, Respondent ANNA DoPADRE actually filed an adversary proceeding objecting to the dischargeability of her claim and litigated same to judgment which was adverse to her, without in any way alerting the bankruptcy court that she claimed an equitable interest in property of the estate or otherwise considered the Arizona judgment upon which her claim was based to be "unfinal" in any respect. Then, having suffered adverse judgment in the United States Bankruptcy Court, she returned to the state court dissolution

proceeding two years after the bankruptcy discharge in an attempt to recharacterize the nature of her claim in a manner wholly inconsistent with her previous reliance upon the dissolution decree as the very basis of her claim.

Clearly, the contrary decision in the second action (the reopening of the Arizona divorce decree) impairs and destroys rights established by the first judgment (the judgment of the United States Bankruptcy Court that Mrs. DoPADRE's claim is dischargeable) and amounts to an impermissible splitting of a cause of action which is barred by res judicata. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 (1927).

THE EFFECT OF 11 U.S.C. §524

Section 524 of the Bankruptcy Code voids any judgment, at any time obtained,

to the extent that such a judgment is a determination of the personal liability of the debtor with respect to any debt that has been discharged under the Bankruptcy Code. It is significant that the Arizona trial court in its "Third Amended Decree of Dissolution of Marriage *nunc pro tunc*," signed by the judge of the superior court on June 28, 1993, was rendered "Nunc pro tunc to the date of original Decree." The date of the original decree of dissolution of marriage was July 13, 1987, which predates JOE's voluntary petition in bankruptcy (April 5, 1989) by nearly two years, making JOE personally liable for all retirement benefits he received from July 13, 1987 to the date of his petition in bankruptcy. This judgment is unquestionably void pursuant to 11 U.S.C. §524(a), and should be declared so by this Court.

Moreover, even if the state court had not made the Third Amended Decree retroactive to 1987, it is not permissible to categorize a debtor's bankruptcy as a "change in circumstances" as grounds to alter or amend a judgment in order to impose additional obligations upon the debtor since such acts constitute an attempt to circumvent the provisions of the automatic stay (pre-discharge) and §524(a) (post-discharge). *In re Freels*, 79 B.R. 358 (Bankr. E. D. Tenn. 1987). Further, the judgment obtained by Mrs. DoPADRE subsequent to the bankruptcy discharge is void under §524 to the extent that it was based upon debts arising out of the 1987 decree of dissolution of marriage. *Matter of Gallagher*, 47 B.R. 92, 97-98 (Bankr. W. D. Wisc. 1985). Any other construction would allow state courts to totally emasculate the policies of the Bankruptcy

Code.

CONCLUSION

The courts of Arizona erred in not according res judicata effect to the orders of the United States Bankruptcy Code (the discharge of debtor dated August 22, 1989 and the final judgment dated March 19, 1990 in the adversarial proceeding relating to the dischargeability of Respondent ANNA DoPADRE's claim) as required by the full faith and credit clause of the Constitution of the United States.

For the reasons stated above, the judgment of the Supreme Court of Arizona should be REVERSED and judgment RENDERED in favor of Petitioner to the effect that Respondent's claims are barred under the doctrine of res judicata. Petitioner prays for such other and further relief to which he may show himself justly

entitled.

Respectfully submitted,
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**IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE**

IN RE: THE MARRIAGE OF	)	
	)	
ANNA G. DoPADRE,	)	NO. DR-5184
	)	
Petitioner	)	**DECREE OF**
	)	**DISSOLUTION**
	)	**OF MARRIAGE**
and	)	
	)	
JOSEPH G. DoPADRE,	)	
Respondent	)	
	)	

This proceeding in Dissolution of Marriage having come on for hearing by the Court sitting without a jury, and the Court having found that the petitioner, at the time the proceeding was commenced, was domiciled in Cochise County, Arizona, and that such domicile had been maintained for ninety (90) days prior to

filing the petition; that the conciliation provisions of A.R.S. Section 25-381.09 do not apply; that the marriage is irretrievably broken and to the extent it has jurisdiction to do so, the Court has considered, approved and made provision for spousal maintenance and the disposition of property.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. That the marriage previously existing between petitioner and respondent is hereby dissolved and the parties are returned to the legal status of single persons.

2. That petitioner shall retain the personal property which she currently possesses, including clothing, jewelry, personal effects, furniture an other household items.

3. That respondent shall retain the personal property which he currently

possesses, including clothing, jewelry, personal effects, furniture and other household items.

4. That petitioner shall retain as her sole and separate property the 1982 Honda.

5. That respondent shall retain as his sole and separate property the 1977 Plymouth.

6. That petitioner shall retain as her sole and separate property the family residence located at 812 Heather Drive, Sierra Vista, Arizona, subject to any indebtedness thereon.

7. That petitioner shall retain as her sole and separate property the family residence located at 812 Heather Drive, Sierra Vista, Arizona, subject to any indebtedness thereon.

8. That petitioner shall retain her Individual Retirement Account (IRA) with an approximate balance of $250.00.

9. That respondent shall retain his Individual Retirement Account (IRA) with an approximate balance of $4,850.00.

10. That petitioner shall retain as her sole an separate property the John Hancock Life Insurance Policy with a cash surrender value of approximately $5,200.00.

11. That petitioner and respondent shall share equally the tax liability of approximately $1,500.00.

12. That with regard to the two retirement plans of respondent, and in keeping with the holding in Koelsch v. Koelsch, the respondent is awarded his military retirement benefits in their entirety, the present value of which is $118,000.00 and to which petitioner would otherwise be entitled to 46%. The other plan, respondent's civil service retirement, which has a present value of $101,022.00, is also awarded to

respondent. In view of the above disposition of community assets, the petitioner is awarded the sum of $75,000.00. Respondent shall satisfy this award to the petitioner by monthly payments over a period of fifteen years, with simple interest at the rate of 9%. Respondent shall secure the amount owed by the petitioner by a life insurance policy with a face amount equal to the decreasing balance of the debt owed to petitioner. Petitioner shall be the sole, irrevocable beneficiary until the $75,000.00 has been paid in full.

13. That neither party shall pay spousal maintenance to the other.

14. That each party will bear his or her own attorney's fees and costs.

DATED this 13th day of July, 1987.

/SIGNED/
JAMES L. RILEY
JUDGE OF THE SUPERIOR COURT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ANNA G. DoPADRE, Petitioner v. JOSEPH G. DoPADRE, Respondent/ Appellee.	2 CA-CV 87-0285 DEPARTMENT B O P I N I O N

APPEAL FROM THE SUPERIOR COURT OF
COCHISE COUNTY

Cause No. DR-5184

Honorable James L. Riley, Judge

AFFIRMED

Robert J. Snyder, Jr., P.C.
Sierra Vista

Attorney for Petitioner/Appellant

RAMAEKER & RONDEAU
By Jonathan Reich
Sierra Vista

Attorneys for Respondent/Appellee

R O L L , Judge

Appellant Anna G. Dopadre (Anna) appeals certain portions of the decree entered in connection with the dissolution of her marriage to Joseph G. Dopadre (Joseph). Specifically, Anna appeals the trial court's order insofar as it pertains to (1) two retirement plans in which Joseph is enrolled, and (2) denial of spousal maintenance to Anna. For the reasons set forth below, we affirm.

FACTS

On July 22, 1986, Anna filed a petition for decree of dissolution of marriage. Trial was held on March 19, 1987. Anna and Joseph were the only witnesses.

Joseph and Anna were married for 37 years. At the time of trial, Joseph was 61 years old and a civil servant with a GS-9, Step 4 rating. He was also

receiving retirement benefits from the United States Army. Anna was last employed in 1972, when she worked as a clerk. Throughout her life she has had back problems, which persist at the present time. At the time of trial, she was 60 years old.

TRIAL COURT RULINGS

The trial court granted Anna's petition for decree of dissolution of marriage. In ordering division of property, the trial court awarded Anna the couple's residence, which has a net equity value of approximately $55,500.00, a 1982 Honda automobile with a value of $5,000.00 to $6,000.00, Prudential Bank securities having a value of $5,500.00, a life insurance policy with a cash surrender value of $5,226.00, an IRA account with a value of $250.00, and furniture in the home having a value of

between $2,446.00 and $12,375.00. The court also awarded a lump sum of $75,000.00 to be paid in monthly installments for fifteen years, accumulating interest a 9% per annum, and which is to be secured by a life insurance policy with a face amount equal to the decreasing balance of the debt owed Anna. Anna was also obligated for one-half of a currently pending $1,500.00 tax liability.

Joseph was awarded the civil service retirement plan having a present value of $101,022.00, the military retirement plan having a present value of $118,000.00, an IRA account with a value of $4,850.00, and a 1977 Plymouth valued at $1,175.00. Joseph was ordered to pay one-half of a present tax liability of $1,500.00 and to secure a life insurance policy with a face amount equal to the decreasing balance of the $75,000.00 owed to Anna.

The evidence reflected that Joseph's net receipt from his military retirement is $801.01 each month. His net employment pay is $1,256.66 per month. Of this total income of $2,057.67, he pays $767.70 per month to Anna in connection with the $75,000.00 lump sum and maintains the life insurance policy. When Joseph retires from his civil service job, his income will drop dramatically. He owns no other significant property.

ISSUES ON APPEAL

Anna argues that she should have been awarded an interest in the pension plans and was entitled to spousal maintenance.

PENSION PLANS

Joseph presently receives benefits from an Army retirement plan and, upon retirement, will receive civil service

retirement benefits. It is undisputed that pension plans are a form of deferred compensation for services rendered, and any portion of a plan earned during marriage is community property subject to equitable division at dissolution. Koelsch v. Koelsch, 148 Ariz. 176, 181, 713 P.2d 1234, 1239 (1986). Pension plans can present a panoply of complications in the context of property divisions. A spouse's postponement of retirement may delay receipt of pension benefits. The death of the employee spouse may divest a divorced spouse of pension benefits.

In the instant case, the trial court determined the present value of the pension plans for which Joseph was eligible. The trial court then awarded Anna $75,000.00 but, because the pension benefits cannot be received by Joseph in a lump sum, directed that the $75,000.00

be paid in monthly installments with 9% interest over a 15-year period. The trial court also directed Joseph to obtain a life insurance policy which guarantees that Anna will receive this $75,000.00 sum.

Anna argues that it is conceivable that Joseph could avoid payment of the $75,000.00 by filing for bankruptcy at some future time and, accordingly, that her interests in the pensions funds would be better protected if the trial court had awarded her an actual interest in the pension funds. However, the trial court provided reasonable safeguards for Anna's receipt of the $75,000.00 sum and was not required to take into account every speculative possibility. Our supreme court in Koelsch specifically approved of the use of installment payments when lump sum distribution is impractical at dissolution. Id., 148 Ariz. at 184, 713

P.2d at 1242.

The trial court's division of community property will not be disturbed on appeal absent a clear abuse of discretion. Wick v. Wick, 107 Ariz. 382, 385, 489 P.2d 19, 22 (1971). The trial court reached an equitable apportionment of the community property. Cockrill v. Cockrill, 139 Ariz. 72, 74-5, 676 P.2d 1130, 1132-33 (App. 1983).

SPOUSAL MAINTENANCE

The trial court's award or denial of spousal maintenance will not be overturned on appeal absent a clear abuse of discretion. Deatherage v. Deatherage, 140 Ariz. 317, 319, 681 P.2d 469, 471 (App. 1984). A.R.S. §25-319(A)[1] gives the trial court broad discretion to

[1]This statute was amended in 1987 to add two additional factors which the court must consider. The amendments are not applicable to this case. A.R.S. §25-319(a) (Supp. 1987).

determine whether either party should be required to pay spousal maintenance and then only if the court finds that the spouse:

> 1. Lacks sufficient property, including property apportioned to such spouse, to provide for his or her reasonable needs.
>
> 2. Is unable to support himself or herself through appropriate employment or is the custodian of a child whose age or condition is such that the custodian should not be required to seek employment outside the home or lacks earning ability in the labor market adequate to support himself or herself.

Presently, Joseph receives $2,057.67 net combined monthly income from his military retirement and employment. From this sum, he is required to pay $767.70 per month to appellant to satisfy the $75,000.00 lump sum award to Anna. Should Joseph retire in July of 1988, his civil service retirement benefits will be $530.00 per month before taxes. His net

income will decrease from $2,057.67 per month to an approximate net income of $1,200.00 per month, from which he will continue to be obligated to pay Anna $767.70 per month. Based upon the previously described property division and the particular financial situation of Joseph and Anna, we cannot say that the trial court abused its discretion in declining to award Anna spousal maintenance.

We decline to award attorney's fees in connection with this appeal.

/SIGNED/
JOHN M. ROLL, Judge

CONCURRING:

/SIGNED/
JOSEPH M. LIVERMORE,
Presiding Judge

/SIGNED/
LLOYD FERNANDEZ,
Judge

United States Bankruptcy Court for the Northern District of Texas

In re Joseph Goncalves Do Padre
Debtor (set forth here all names including trade names used by Debtor within last 6 years).
Soc. Sec. No. 032-14-3368

Case No. 589 50204

VOLUNTARY PETITION

1. Petitioner's mailing address, including county, is P.O. Box 53132, Lubbock, Lubbock County, Texas 79453.

2. Petitioner has

_X_ resided within this district for the preceding 180 days.
___ had his(her) domicile within this district for the preceding 180 days.
___ had his(her) principal place of business within this district for the preceding 180 days.
___ had his(her) principal assets within this district for the preceding 180 days.
___ resided or has had his(her) domicile **or** has had his(her) principal place of business **or** has had his(her) principal assets within this district for a longer portion of the preceding 180 days than in any other district.

3. Petitioner is qualified to file this petition and is entitled to the benefits of title 11, United States Code as a

voluntary debtor.

4. (If appropriate) A copy of petitioner's proposed plan, dated _____ is attached (**or** Petitioner intends to file a plan pursuant to chapter 11 **or** chapter 13) of title 11, United States Code.

5. (If petitioner is a corporation) Exhibit "A" is attached to and made part of this petition.

WHEREFORE, petitioner prays for relief in accordance with chapter 7 of title 11, United States Code.

Signed: _____/SIGNED/_____
Clinton W. Cook,
Attorney for Petitioner

Address: 2118 Broadway
Lubbock, Texas 79408

DECLARATION

INDIVIDUAL: I, Joseph Goncalves Do Padre, the petitioner named in the foregoing petition, declare under penalty of perjury that the foregoing is true and correct.

JOINT INDIVIDUALS: I, _____, and I, _____, the petitioners named in the foregoing petition, declare under penalty of perjury that the foregoing is true and correct.

CORPORATION: I, _____ the _____, (the president **or** other officer **or** an authorized agent) of the corporation named as petitioner in the foregoing petition, declare under penalty of

perjury that the foregoing is true and correct, and that the filing of this petition on behalf of the corporation has been authorized.

PARTNERSHIP: I, _____, a(an) _____ (a member or an authorized agent) of the partnership named as petitioner in the foregoing petition, declare under penalty of perjury that the foregoing is true and correct, and that the filing of this petition on behalf of the partnership has bee authorized.

Executed on April 4, 1989.

Signature: /SIGNED/
Joseph G. DoPadre, Petitioner

Myrtle McDonald
JONES, FLYGARE, GALEY, BROWN & WHARTON
1600 Civic Center Plaza
P.O. Box 2426
Lubbock, Texas 79408-2426
Tel. (806) 765-8851
Attorney for Anna DoPadre

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

IN RE:	*	
	*	
JOSEPH GONCALVES	*	CASE NO.
DO PADRE	*	589-50204
	*	
DEBTOR	*	

ANNA G. DO PADRE	*	
	*	
PLAINTIFF	*	
	*	
VS.	*	ADVERSARY NO.
	*	589-5050
JOSEPH GONCALVES	*	
DO PADRE	*	
	*	
DEFENDANT	*	

COMPLAINT OBJECTING TO DISCHARGE

TO SAID HONORABLE COURT:

ANNA G. DO PADRE, Plaintiff, respectfully represents:

I.

Plaintiff is the holder of a claim

in this case, believed to be secured by a term life insurance policy on the life of Debtor pursuant to Decree of Dissolution of Marriage in Case # DR-5184, in the Superior Court of the State of Arizona in and for the County of Cochise.

II.

This adversary proceeding is brought in connection with Defendant's case under Chapter 7 of the Bankruptcy Code, Number 589-50204, which is now pending before this Court.

This Court has jurisdiction of this adversary proceeding pursuant to 28 U.S.C. Section 157 and 1334 and 11 U.S.C. Section 523(a)(5).

III.

Plaintiff and Defendant were divorced in Cochise County, Arizona on July 13, 1987. A copy of the such Decree of Divorce is attached hereto marked Plaintiff's Exhibit "A". In such Decree

of Divorce, Defendant was awarded two retirement plans, one with the present value of $118,000.00 and one with the present value of $101,202.00.

Defendant was ordered to pay Plaintiff the sum of $75,000.00 in monthly payments over a period of fifteen (15) years at the rate of nine (9%) percent to be secured by life insurance policy with a face amount of $75,000.00.

IV.

Such Decree of Dissolution was appealed to the Court of Appeals, Division II of the State of Arizona. An opinion was filed by the Clerk of the Court on January 26, 1988. A copy of such opinion is attached hereto marked Plaintiff's Exhibit "B".

The issue on appeal was that Plaintiff should have been awarded an interest in pension plans and entitled to spouse maintenance. In such appeal it

was argued that payments could be avoided by filing a bankruptcy at some time in the future. As can be seen from the appeal, the appellant Court affirmed the decision of the lower Court.

V.

Payments to Anna G. DoPadre, pursuant to such decree, have not been received from Joseph G. DoPadre since the petition for relief under Chapter 7 was filed. Listed as unsecured creditors on schedule A-3 of Debtors petition is Anna G. DoPadre and First Colonial Life Insurance Company shown as an unsecured creditor pursuant to Anna G. DoPadre. The only debts not assumed by Debtor are one to Sears Roebuck, shown to be in the amount of $900.00 and W.D. Wilkins, shown to be in the amount of $656.00. The schedules of Debtor reflect debts in the amount of $138,526.81 and assets in the amount of $301,993.00.

It is believed that Defendant is presently receiving Social Security benefits in addition to those items of income listed on Schedule of Current Income and Expenses.

Based on the matters set forth above, Plaintiff alleges that the bankruptcy was filed only to avoid any payments to her under the Dissolution of Divorce and request the Court to determine that such payments of retirement benefits are in fact alimony to, maintenance for and support of Anna G. DoPadre and that such payments are not dischargeable under Section 523 of 11 U.S.C.

WHEREFORE upon notice and hearing, Plaintiff prays that the Court determine that such payments totalling $75,000.00 under the Decree of Dissolution of Divorce be determined not dischargeable as to the Debtor.

Respectfully Submitted,

JONES, FLYGARE, GALEY,
BROWN & WHARTON
1600 Civic Center Plaza
Post Office Box 2426
Lubbock, Texas 79408
Tel. (806) 765-8851

By: /SIGNED/
MYRTLE MCDONALD

CERTIFICATE OF SERVICE

I, MYRTLE MCDONALD, do hereby certify that a true and correct copy of the foregoing Complaint to Discharge has this 18th day of July, 1989, been mailed to the United States Trustee, Room 9C60, 1100 Commerce Street, Lubbock, Texas 75242, and Mr. Clinton Cook, Attorney for Debtor, 2118 Broadway, Lubbock, Texas 79401.

/SIGNED/
MYRTLE MCDONALD

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

In Re
DO PADRE, Joseph Goncalves
P.O. Box 53132
Lubbock, TX 79453

DSSAN : 032-14-3368

Case No. 589-50204-JCA

Date Filed 04/05/89
Chapter 7

DISCHARGE OF DEBTOR

It appears that the person named above filed a petition commencing a case under title 11, United States Code and that an order for relief was entered under chapter 7, and that no complaint objecting to the discharge of the debtor was filed within the time fixed by the court (or that a complaint objecting to discharge of the debtor was filed and, after due notice and hearing, was not sustained).

IT IS ORDERED THAT:

1. The above-named debtor is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

(a) debts dischargeable under

11 U.S.C. §523;

(b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from the discharge under clauses (2), (4) and (6) of 11 U.S.C. §523(a);

(c) debts determined by this court to be discharged under 11 U.S.C. §523.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named debtor.

Date: August 22, 1989

/SIGNED/
JOHN C. AKARD,
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

IN RE:	*	
	*	
JOSEPH GONCALVES	*	CASE NO.
DO PADRE	*	589-50204 JCA-7
	*	
Debtor	*	

ANNA G. DO PADRE	*	
	*	
Plaintiff	*	
	*	
VS.	*	ADVERSARY NO.
	*	289-2050
JOSEPH GONCALVES	*	
DO PADRE	*	
	*	
Defendant	*	

FINAL JUDGMENT

For the reasons contained in the foregoing Findings of Fact and Conclusions of Law made this date, the Court finds that the following judgment is proper.

It is, therefore, ORDERED that the claim of Plaintiff Anna G. Do Padre is found to be dischargeable in bankruptcy; each side is to absorb their own court

costs.

SIGNED: March 19, 1990.

/SIGNED/
Robert C. McGuire
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

IN RE:	*	
	*	
JOSEPH GONCALVES	*	CASE NO.
DO PADRE	*	589-50204 JCA-7
	*	
Debtor	*	

ANNA G. DO PADRE	*	
	*	
Plaintiff	*	
	*	
VS.	*	ADVERSARY NO.
	*	289-2050
JOSEPH GONCALVES	*	
DO PADRE	*	
	*	
Defendant	*	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following are the Court's Findings of Fact and Conclusions of Law with respect to the trial on February 12, 1990.

Findings of Fact

1. Anna G. Do Padre ("Plaintiff") and Joseph Goncalves Do Padre ("Defendant") were married for thirty-seven years.

2. Decree of Dissolution of Marriage (the "Divorce Decree") was entered July 13, 1987.

3. At the time of the Divorce Decree, Plaintiff was sixty years old and Defendant was sixty-one years of age.

4. Defendant received military retirement benefits and was employed as a civil servant with a GS-9, step 4 rating at the time of the divorce.

5. Plaintiff was employed at the time of the divorce and had last worked in 1972 as a clerk.

6. Plaintiff has suffered back problems throughout her lifetime.

7. As a part of the Divorce Decree, Defendant was awarded military retirement benefits and civil service retirement benefits.

8. Plaintiff was awarded $75,000 to be paid monthly over a period of

fifteen years with simple interest at the rate of nine percent.

9. The Divorce Decree specifically provided that neither party shall pay spousal maintenance to the other.

10. Defendant was ordered to secure a life insurance policy with a face amount equal to the decreasing balance of the debt to Plaintiff, with Plaintiff the sole, irrevocable beneficiary until the $75,000 had been paid in full.

11. The Divorce Decree was appealed and affirmed by opinion of the Arizona Court of Appeals on January 26, 1988.

12. the Appeals Court affirmed the lower court Divorce Decree, holding that there was no abuse of discretion in declining to award Plaintiff spousal maintenance.

13. On October 28, 1988, Defendant moved to Lubbock, Texas.

14. In April 1989, Defendant filed for relief under Chapter 7 of the Bankruptcy Code.

15. The only unreaffirmed debts of Defendant are: Plaintiff - Divorce Decree, $70,510.20; First Colonial Life - Insurance on Debt, Unliquidated; Sears, Roebuck - $900; W.D. Wilkins - $656.

16. No payments have been made to Plaintiff since the petition in bankruptcy was filed.

17. As of August 1, 1989, Defendant was employed as a court security officer in the United States Courthouse in Lubbock, Texas.

18. Plaintiff herein was the Plaintiff in the divorce suit. Defendant was in the military during their entire marriage. Plaintiff's education was

limited to high school. Plaintiff presently has to wear a back brace. She cannot sit or stand for any length of time. She is presently in dire financial condition.

19. Allegedly, upon advice from the Internal Revenue Service, Plaintiff reflected the payments received from Defendant as income on the tax return, notwithstanding the prior court findings hat they were not for spousal support.

20. Plaintiff presently has a $34,000 mortgage on her home, which she is trying to sell for $88,000; however, there is little market for the house. The State Appellate Court previously found that Plaintiff had an approximate $55,500 equity in the house.

21. The State Appellate Court accurately described the trial court's ruling

as follows:

TRIAL COURT RULINGS

The trial court granted Anna's petition for decree of dissolution of marriage. In ordering division of property, the trial court awarded Anna the couple's residence, which has a net equity value of approximately $55,500.00, a 1982 Honda automobile with a value of $5,000 to $6,000, Prudential Bank securities having a value of $5,500.00, a life insurance policy with a cash surrender value of $5,226.00, an IRA account with a value of $250.00, and furniture in the home having a value of between $2,446.00 and $12,375.00. The court also awarded a lump sum of $75,000.00 to be paid in monthly installments for fifteen years, accumulating interest at 9% per annum, and which is to be secured by a life insurance policy with a face amount equal to the decreasing balance of the debt owed Anna. Anna was also obligated for one-half of a currently pending $1,500.00 tax liability.

Joseph was awarded the civil service retirement plan having a present value of $101,022.00, the military retirement plan having a present value of $118,000.00,

an IRA account with a value of $4,850.00, and a 1977 Plymouth valued at $1,175.00. Joseph was ordered to pay one-half of a present tax liability of $1,500.00 and to secure a life insurance policy with a face amount equal to the decreasing balance of the $75,000.00 owed to Anna.

The evidence reflected that Joseph's net receipt from his military retirement is $801.01 each month. His net employment pay is $1,256.66 per month. Of this total income of $2,057.67, he pays $767.70 per month to Anna in connection with the $75,000.00 lump sum and maintains the life insurance policy. When Joseph retires from his civil service job, his income will drop dramatically. He owns no other significant property.

The State Appellate Court made the following additional accurate findings:

Anna argues that it is conceivable that Joseph could avoid payment of the $75,000.00 by filing for bankruptcy at some future time and, accordingly, that her interests in the pension funds would be better protected if the trial court had awarded her an actual interest in the pension funds.

However, the trial court provided reasonable safeguards for Anna's receipt of the $75,000.00 sum and was not required to take into account every speculative possibility. Our supreme court in Koelsch specifically approved the use of installment payments when lump sum distribution is impractical at dissolution. Id., 148, 713 P.2d at 1242.

The opinion further states at pp. 5 and 6:

SPOUSAL MAINTENANCE

The trial court's award or denial of spousal maintenance will not be overturned [sic] on appeal absent a clear abuse of discretion. Deatherage v. deatherage, 140 Ariz. 317, 319, 681 P.2d 469, 471 (App. 1984). A.R.S. § 25-319(A)[1] gives the trial court broad discretion to determine whether either party should be required to pay spousal maintenance and then only if the court finds that the spouse:

1. Lacks sufficient property, including property apportioned to such spouse, to provide for his or her reasonable needs.

---

[1]This statute was amended in 1987 to add two additional factors which the court must consider. The amendments are not applicable to this case. A.R.S. § 25-319(A) (Supp. 1987).

2. Is unable to support himself or herself through appropriate employment or is the custodian of a child whose age or condition is such that the custodian should not be required to seek employment outside the home or lacks earning ability in the labor market adequate to support himself or herself.

Presently, Joseph receives $2,057.67 net combined monthly income from his military retirement and employment. From this sum, he is required to pay $767.70 per month to appellant to satisfy the $75,000.00 lump sum award to Anna. Should Joseph retire in July of 1988, his civil service retirement benefits will be $530.00 per month before taxes. His net income will decrease from $2,057.67 per month to an approximate net income of $1,200.00 per month, from which he will continue to be obligated to pay Anna $767.70 per month. Based upon the previously described property division and the particular financial situation of Joseph and Anna, we cannot say that the trial court abused its discretion in declining to award Anna spousal maintenance.

Conclusions of Law

1. '... [R]egardless of how a state may choose to

> define alimony, a federal court, for purposes of applying the federal bankruptcy laws, is not bound to a label that a state affixes to an award... [C]onsistant with the objectives of federal bankruptcy policy, the substance of the award must govern.'
>
> Erspan v. Badgett, 647 F.2d 550,555 (5th Cir. 1981), cert.denied, 455 U.S. 945, 102 S.Ct. 1443, 71 L.Ed.2d 658 (1982).

In re Cacolici, 108 B.R. 578, 583 (Bankr. N.D. Ohio 1989).

2. Under the totality of the circumstances, it appears that the $75,000 in payments to Plaintiff ordered under the Divorce Decree was intended by the State Court as property equalization payments, rather than support or alimony payments, and is therefore, dischargeable under § 523.

3. In addition to the prior discussion,

the following is the Court's analysis of the factors courts commonly consider in analyzing intent. In re Davidson, 104 B.R. 788, 794 (Bankr. N.D. Tex. 1989); In re Coffman, 52 B.R. 667, 669, 674-675 (Bankr. D. Md. 1985). In brackets following each factor, this Court finds whether such factor gravitates toward support or property equalization in this case.

A. The length of the marriage. [Support]

B. Whether there are minor children in the care of the creditor spouse. [Property equalization]

C. The parties' standard of living during marriage. [Partially support]

D. Whether the creditor spouse had

shown, at the time of the divorce, a need for support. Whether the former spouse was shown, at the time of the divorce, to have suffered in the job market, or was otherwise disadvantaged because of any dependent position held in relation to the debtor during the marriage. [Support]

E. The financial resources of each spouse, including income from employment or elsewhere. [Under the Divorce Decree, Plaintiff received the bulk of the parties' liquid property. Debtor had substantially better job prospects -- Support]

F. Whether the payments were made periodically, or over an extended period, or in a lump sum. [Support]

G. Whether payments were fashioned in order to balance the disparate income of the parties. [It appears that the judge fashioned the payments taking into account the liquid property -- Property equalization]

H. The ages, health, work skills, and educational level of the parties. [Support]

I. Whether the terms of the settlement (judgment) agreement indicated that the agreement was support, rather than property division. [Property equalization]

J. Whether debtor's obligation terminates upon death or remarriage of the spouse or a certain age of the children or any other contingency such as a

change in circumstances. It does not in this case. [Property equalization]

K. The circumstances contributing to the estrangement of the parties. [Unknown]

L. Whether the debt is for a past or future obligation, any property division, or any allocation of debt between the parties. [Property equalization]

M. The value of property interests of each party. [Property equalization]

N. the tax treatment of the payment by the spouse. [Marginal factor: It appears wife claimed it incorrectly as alimony on her tax return. There was no showing that the husband deducted it on his

return as alimony.]

In re Fox, 5 B.R. 317 (Bankr. N.D. Tex. 1980), had facts very similar to the facts in this case. Likewise, see In re Nunnally, 506 F.2d 1024 (5th Cir. 1975); however, as pointed out in In re Fox, supra, at 321, the payments in that case were to begin when the plaintiff's child support ceased. Additionally, the plaintiff offered the expert testimony of a Texas Domestic Relations Court Judge explaining some of the reasons for structuring the debt the way it was structured. Unlike Texas, Arizona, at the time of the Divorce Decree, permitted the Domestic Relations Court Judge to award spousal support if he thought it was appropriate. The asset division appeared clear-cut and the Arizona Domestic Relations Court

deliberately chose not to structure the award as spousal support in spite of Plaintiff's protestations that bankruptcy might well wipe out the obligation as structured. The Appellate Court specifically reaffirmed the trial court decision. In In re Fox, supra, at 320, the court stated:

> Nunnally has been a difficult case to interpret and apply to other fact patterns and it has been somewhat overruled by the new Code. First, the language of the Code imposes a more stringent burden than Nunnally. The Code provides the award must be in the nature of alimony, support or maintenance which means that the award essentially must be for support or maintenance. Under Nunnally, it was enough if support considerations played a significant role in the determination of the award. Second, in Nunnally the Court did not discuss the facts; rather it appeared to determine that support played a significant role as a matter of law. A meaningful interpretation of Nunnally and of the Congressional intent in

enacting §523 requires looking at the facts of each case to determine whether the award is in the nature of alimony support, or maintenance. Finally, Nunnally presents an all-or-nothing proposition; the award is either on of support or not. However, in examining a particular set of facts, it may be evident that only a portion of an award was in the nature of support and maintenance making only that particular part of the award non-dischargeable.

Based upon this record, the Plaintiff has failed to meet her burden of proof to show that the structured payments were, in whole or a proven part, "essentially" for support or maintenance. In re Davidson, supra, Berryman, Bankruptcy Discharge of Texas Marital Property Awards Under § 523(a)(5) of the Bankruptcy Code: Rethinking In re Nunnally, 41 SWLJ 869 (1987).

SIGNED: March 19, 1990.

/SIGNED/
Robert C. McGuire
U.S. Bankruptcy Judge

CHARLES A. IRWIN
ELLEDGE & IRWIN, P.C.
333 West Wilcox Drive, Suite 205
Sierra Vista, AZ 85635
(602) 458-0122

Attorneys for Petitioner

**IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCHISE**

IN RE: THE MARRIAGE OF	
ANNA G. DoPADRE,	NO. DR-5184
Petitioner	**THIRD AMENDED DECREE OF DISSOLUTION OF MARRIAGE NUNC PRO TUNC**
and	
JOSEPH G. DoPADRE, Respondent	(Assigned to the Honorable James L. Riley)

This proceeding to amend/set aside paragraph 12 of the Decree of Dissolution of Marriage entered the 13th day of July, 1987, having come on for hearing by the Court, the Petitioner being present and represented by counsel, Charles A. Irwin, and the Respondent being present and represented by counsel, Wallace R.

Hoggatt, and the Court having found as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That this Court had personal jurisdiction over the parties at the time of the original decree due to both parties having been domiciled in this state for more than ninety (90) days prior to the filing of this action;

2. That it maintains such jurisdiction over the persons and jurisdiction to deal with the issues presented at this Order to Show Cause hearing;

3. That the prior decisions of this Court, the Arizona Court of Appeals, and the U.S. Bankruptcy Court for the Northern District of Texas, Lubbock Division, Case No. 589-50204, based on the facts present at the time and applicable case law, were correct and may not now be challenged;

4. That at the time of the original dissolution decree, Petitioner's request for an award of spousal maintenance was denied due to the division of community property, including the $75,000.00 promissory note to Petitioner from Respondent, thereby providing sufficient property to each spouse and eliminating the need for spousal maintenance;

5. In the original decree, the Respondent was awarded property which included two of the community's most valuable assets, the military and civil service retirement plans

6. To equalize the above award, Petitioner was awarded various smaller assets, the community residence and a $75,000.00 promissory note from Respondent, which earned 9% interest per annum;

7. Shortly after the appellate

proceeding in Arizona ended, Respondent moved to Texas and shortly thereafter filed his Petition in the Bankruptcy Court;

8. Respondent chose to reaffirm all debts except the debt to Petitioner and three other small obligations, therefore this Court concludes that the primary purpose for Respondent's Bankruptcy action was to relieve himself of the above promissory note obligation to Petitioner;

9. The discharge of the promissory note to Petitioner, as debt, by the Bankruptcy Court was correct and pursuant to law;

10. The above discharge also rendered meaningless this Court's equitable division of community property and therefore provides equitable reasons to allow the reopening of the previous decree pursuant to Rule 60(c)(6) Arizona

Rules of Civil Procedure and A.R.S. Section 25-327(A);

11. That the Petitioner has been left in the "dire financial condition" as found by the Bankruptcy Court (see Bankruptcy Findings of Fact No. 18) and without any ability to seek spousal maintenance from Respondent;

12. That if these same circumstances had been presented at the time of the trial of this matter, Petitioner would certainly have qualified for a substantial award of spousal maintenance;

13. This Court concludes that Petitioner's requested relief from the Decree of Dissolution does not seek to upset the decisions previously made by the Arizona Court of Appeals nor the Bankruptcy Court; and Respondent's arguments of res judicata and inappropriate use of Rule 60(c) as an

alternative to appeal do not apply;

14. Respondent's argument that Petitioner has accepted benefits from the Decree of Dissolution and therefore may not now challenge that decree is without merit;

15. Respondent's unilateral and voluntary action in seeking to discharge his obligation to Petitioner justifies the application of A.R.S. Section 25-327(A) and Rule 60(c)(6), Arizona Rules of Civil Procedure;

16. That Petitioner has timely brought her motion to reopen/amend the decree based on the chronology of events, together with Petitioner's financial ability to litigate such an action; and further that the Respondent has suffered no legal prejudice from any delay in filing this action by Petitioner, in fact Respondent has benefitted financially in that he has escaped many months of

payments which were ordered by this Court and which Petitioner cannot recover.

THEREFORE IT IS ORDERED, DECREED AND ADJUDGED, that the provisions of paragraph 12 of the Decree of Dissolution of Marriage, dated July 13, 1987, is amended to read as follows:

12. That with regard to the two (military and civil service) United States Government Retirement Plans of Respondent, the Petitioner is awarded her community property interest in each as set forth below:

a. United States Vested Military Retirement; Petitioner is awarded her interest in Respondent's vested military retirement pay based on the following formula:

$$1/2 \times \frac{\text{Months married while Respondent earned retirement benefits (221)}}{\text{Months Respondent earned retirement benefits until eligible to retire (240)}}$$

X Monthly Retirement benefits as defined in the Uniformed Services Former Spouses Protection Act ("Act") and amendments thereto

= 46% (percentage to be received by the petitioner)

Such payments shall be paid from the source, Defense Finance and Accounting Service - Indianapolis Center based on the length of time the parties were married (18 years) during which Respondent performed over 10 years of service creditable towards retirement. Petitioner is also awarded any and all rights afforded her pursuant to the Uniformed Services Former Spouses Protection Act and any amendment thereto and is specifically to be named as irrevocable beneficiary on the Respondent's Survivor's Benefit Plan, even if such designation shall be a "deemed election" pursuant to the above act.

b. United States Vested Civil

Service Retirement

Petitioner is awarded her interest in Respondent's Civil Service Retirement equal to 50% of such retirement.

c. In the event Petitioner cannot be awarded her rights under the Survivor's Benefit Plan for whatever reason, then Respondent shall continue to provide a life insurance policy on his life, with Petitioner named as owner of such policy, with a death benefit equal to $75,000.00. Petitioner shall be the sole, irrevocable beneficiary of such policy.

2. That the remaining provisions of the decree entered on July 13, 1987 shall remain in effect.

DATED this 28th day of June, 1993.

Nunc pro tunc to the date of original Decree.

/SIGNED/
James L. Riley
JUDGE OF THE SUPERIOR COURT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ANNA G. DoPADRE, Petitioner/Appellee, v. JOSEPH G. DoPADRE, Respondent/ Appellee.	2 CA-CV 93-0220 Department A MEMORANDUM DECISION Not for Publication Rule 28(a)(2), Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF
COCHISE COUNTY

Cause No. DR-5184

Honorable James L. Riley, Judge

AFFIRMED

ELLEDGE & IRWIN, P.C. Sierra Vista

Attorney for Petitioner/Appellee

WARD, FREELS & COOK, L.L.P.
by Clinton W. Cook Lubbock, Texas

and

RILEY, HOGGATT & SUAGEE, P.C.
by Wallace R. Hoggatt Sierra Vista

Attorneys for Respondent/Appellant

L A C A G N I N A , Judge

This appeal arises from the June 28, 1993 Third Amended Decree of Dissolution of Marriage modifying paragraph 12 of a decree of dissolution dated July 13, 1987. The division of community property covered by paragraph 12 of the original decree awarded the husband the entirety of two pension plans and ordered him to execute a note in favor of his wife for $75,000 payable in monthly installments as payment for the wife's interest in the pensions. The findings of the trial court are supported by the evidence, and we affirm the judgment based on the following findings:

> 4. That at the time of the original dissolution decree, Petitioner's request for an award of spousal maintenance was denied due to the division of community property, including the $75,000.00 promissory note to Petitioner from Respondent, thereby providing sufficient property to each spouse and eliminating the need for spousal maintenance;

5. In the original decree, the Respondent was awarded property which included two of the community's most valuable assets, the military and civil service retirement plans;

6. To equalize the above award, Petitioner was awarded various smaller assets, the community residence and a $75,000.00 promissory note from Respondent, which earned 9% interest per annum;

7. Shortly after the appellate proceeding in Arizona ended, Respondent moved to Texas and shortly thereafter filed his Petition in the Bankruptcy Court;

8. Respondent chose to reaffirm all debts except the debt to Petitioner and three other small obligations, therefore this Court concludes that the primary purpose for Respondent's Bankruptcy action was to relieve himself of the above promissory note obligation to Petitioner;

9. The discharge of the promissory note to Petitioner, as debt, by the Bankruptcy Court was correct and pursuant to law;

10. The above discharge also rendered meaningless this Court's equitable division of

community property and therefore provides equitable reasons to allow the reopening of the previous decree pursuant to Rule 60(c)(6) Arizona Rules of Civil Procedure and A.R.S. Section 25-327(A);

11. That the Petitioner has been left in the "dire financial condition" as found by the Bankruptcy Court (see Bankruptcy Findings of Fact No. 18) and without any ability to seek spousal maintenance from Respondent;

***

13. This Court concludes that Petitioner's requested relief from the Decree of Dissolution does not seek to upset the decisions previously made by the Arizona Court of Appeals nor the Bankruptcy Court; and Respondent's arguments of res judicata and inappropriate use of Rule 60(c) as an alternative to appeal do not apply;

14. Respondent's argument that Petitioner has accepted benefits from the Decree of Dissolution and therefore may not now challenge that decree is without merit;

15. Respondent's unilateral and voluntary action in seeking to discharge his obligation to Petitioner

> justifies the application of A.R.S. Section 25-327(A) and Rule 60(c)(6), Arizona Rules of Civil Procedure;
>
> 16. That Petitioner has timely brought her motion to reopen/amend the decree based on the chronology of events, together with Petitioner's financial ability to litigate such an action; and further that the Respondent has suffered no legal prejudice from any delay in filing this action by Petitioner, in fact Respondent has benefitted financially in that he has escaped many months of payments which were ordered by this Court and which Petitioner cannot recover.

The husband argues that our opinion affirming the original decree of dissolution, DoPadre v. DoPadre, 156 Ariz. 30, 749 P.2d 939 (App. 1988), and the final judgment of the United States Bankruptcy Court in Texas deciding that the debt reflected by the husband's note was dischargeable bar the Rule 60(c)(6) motion for relief. We disagree and hold that the facts as found by the trial

court after hearing fall well within the requirement that one must show a judgment is unjust because of extraordinary circumstances in order to justify the reopening of the property provisions of the original decree pursuant to A.R.S. § 25-327(A) and Ariz. R. Civ. P. 60(c)(6), 16 A.R.S. Tippit v. Lahr, 132 Ariz. 406, 646 P.2d 291 (App. 1982).

The wife applied to this court and asked us to recall the mandate issued pursuant to our original opinion so that she could pursue a Rule 60(c)(6) motion for relief from the original decree. Rogers v. Ogg, 101 Ariz. 161, 416 P.2d 594 (1966). After we declined relief, the Arizona Supreme Court on October 6, 1992, treated the wife's petition for review as a special action, recalled the mandate originally issued in this case, and ordered the matter remanded to the trial court for consideration of the Rule

60(c) petition on the merits. The supreme court must have determined from the allegations of the petition that the wife had a prima facie case for relief under Rule 60(c) hearing entitled the wife to relief from the property provisions of the original decree based on the extraordinary circumstances created by the husband which rendered meaningless the trial court's original equitable division of community property.

The judgment of the trial court is affirmed, and we award appellee attorney's fees on appeal upon compliance with the provisions of Ariz. R. Civ. App. P. 21(c), 17A A.R.S.

/SIGNED/
MICHAEL A. LACAGNINA,
Judge

CONCURRING:

/SIGNED/
JOSEPH M. LIVERMORE,
Presiding Judge

/SIGNED/
LLOYD FERNANDEZ,
Judge

SUPREME COURT
STATE OF ARIZONA

June 24, 1994

RE: ANNA G. DoPRADE vs. JOSEPH G. DoPADRE
Supreme Court No. CV-94-0102-PR
Court of Appeals No. 2 CA-CV 93-0-220
Cochise County No. DR-5184

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on June 24, 1994, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

A panel composed of Chief Justice Feldman, Vice Chief Justice Moeller, and Justice Martone participated in the determination of this matter.

Record returned to Court of Appeals, Division Two, Tucson, this 24th day of June, 1994.

NOEL K. DESSAINT, Clerk

TO: Charles A. Irwin, Esq., Elledge and Irwin, P.C.
Clinton W. Cook, Esq., Ward, Freels & Cook, L.L.P.
Wallace R. Hoggatt, Esq., Riley Hoggatt & Saugee, P.C.
Joyce Goldsmith, Clerk, Court of Appeals, Division Two
West Publishing Company
Mead Data Central
sb

11 U.S.C. Sec. 101. Definitions

In this title-

(4) **"claim" means-**

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed , secured, or unsecured;

(9) **"creditor" means-**

(A) entity that has a claim against the debtor that arose *at the time of or before the order for relief* concerning the debtor (Emphasis added);

(B) entity that has a claim against

the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim;

(11) **"debt" means** liability on a claim;

(30) **"judicial lien" means** lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding;

(31) **"lien" means** charge against or interest in property to secure payment of a debt or performance of an obligation;

---

11 U.S.C. Sec. 102. Rules of construction

In this title-

(2) **"claim against the debtor"** *includes claim against property of the debtor* (Emphasis added);

---

11 U.S.C. Sec. 523. Exceptions to

discharge

(a) *A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt-* (Emphasis added)

(1) for a tax or a customs duty-

(A) of the kind and forth periods specified in section 507(a)(2) or 507(a)(6) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required-

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the

debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by-

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing-

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit

reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $500 for "luxury goods or services" incurred by an individual debtor on or within forty days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within twenty days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not

include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act (15 U.S.C. 1601 et seq.);

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit-

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, *unless such creditor had notice or actual knowledge of the case in time for such timely filing; or* (Emphasis

added)

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a souse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or other order of a court of record, or property settlement agreement, but not to the extent that-

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support; (Emphasis added)

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental

unit, and is not compensation for actual pecuniary loss, other than a tax penalty-

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution, unless-

(A) such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the

debtor and the debtor's dependents;

(9) to any entity, to the extent that such debt arises from a judgment or consent decree entered in a court of record against the debtor wherein liability was incurred by such debtor as a result of the debtor's operation of a motor vehicle while legally intoxicated under the laws or regulations of any jurisdiction within the United States or its territories wherein such motor vehicle was operated and within which such liability was incurred; or

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under 17a(3), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965 (20 U.S.C. 1087-3), or under section 733(g) of the Public Health Services[1] Act (42 U.S.C. 294f) in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6)

[1]So in original. Probably should be "service".

of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

---

11 U.S.C. Sec. 524. Effect of discharge

(a) A discharge in a case under this title-

(1) **voids any judgment at any time obtained**, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. (Emphasis Added).

---

11 U.S.C. Sec. 544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by-

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such

time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b) The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

MARITAL AND DOMESTIC RELATIONS

Arizona Revised Statutes, Sec. 25-327.

Modification and termination of provisions for maintenance, support and property disposition

A. Except as otherwise provided in subsection F of §25-317, the provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to notice of the motion for modification to the opposing party and only upon a showing of changed circumstances which are substantial and continuing. **The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.**

B. Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving

maintenance. (Emphasis Added).

C. Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a minor child are not terminated by the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of future support may be modified, revoked or commuted to a lump sum payment to the extent just and appropriate in the circumstances and shall have priority equal to the right for family allowance in §14-2403. Past due support shall have priority equal to claims provided for in § 14-3805, subsection A, paragraph 6.

Amended by Laws 1977, Ch. 138, § 11; Laws 1987, Ch. 178 §2.

---

16 A.R.S., Ariz. R. of Civ. P., Rule 60(c).

On motion and upon such terms as are

just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6)any other reason justifying relief from the operation of the judgment....

SUPREME COURT, U.S.
FILED
OCT 26 1994
OFFICE OF THE CLERK

(2)

No. 94-543

In The

Supreme Court of the United States

October Term, 1994

JOSEPH G. DoPADRE

Petitioner,

vs.

ANNA G. DoPADRE

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER PETITIONER HAS RAISED TO THE SUPREME COURT OF ARIZONA AND ITS LOWER COURTS THE FEDERAL QUESTION OF FULL FAITH AND CREDIT WHICH HE NOW PRESENTS TO THIS COURT

II

WHETHER A UNITED STATES BANKRUPTCY COURT'S RULING REGARDING DISCHARGEABILITY OF A DEBT RESTRICTS THE ARIZONA COURT'S ABILITY TO EQUITABLY DIVIDE RETIREMENT BENEFITS PURSUANT TO ARIZONA LAW

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No. 94-543

In The

Supreme Court of the United States

October Term, 1994

JOSEPH G. DoPADRE

Petitioner,

vs.

ANNA G. DoPADRE

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONDENT RESPECTFULLY PRAYS THAT THE PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE ARIZONA SUPREME COURT, FILED JUNE 24, 1994 BE DENIED

REFERENCE TO REPORTS

DoPadre and DoPadre, No. DR-5184, Third Amended Decree of Dissolution of Marriage Nunc Pro Tunc, dated June 28, 1993, James L. Riley, Judge of the Superior Court of the State of Arizona in and for Cochise County

DoPadre v. DoPadre, 2 CA-CV93-0220, Dept A MEMORANDUM DECISION OF THE COURT OF APPEALS, STATE OF ARIZONA, DIVISION TWO

DoPadre vs. DoPadre, CV-94-0102-PR, MINUTE ENTRY ORDER OF THE SUPREME COURT OF THE STATE OF ARIZONA, dated June 24, 1994

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

STATUTES

10 U.S.C. SEC. 1408 (UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT) (SEE APPENDIX FOR COMPLETE TEXT OF SECTIONS (a) THROUGH (c))

ARIZONA REVISED STATUTES, SEC. 25-327(A)

MODIFICATION AND TERMINATION OF PROVISIONS FOR MAINTENANCE, SUPPORT AND PROPERTY DISPOSITION.

A. Except as otherwise provided in subsection F of Section 25-317, the provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to notice of the motion for modification to the opposing party and only upon a showing of changed circumstances which are substantial and continuing. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state. Modifications are effective on the first day of the month following the filing of the petition for modification unless the court, for good cause shown, orders the change to become effective at a later date.

ARIZONA RULES OF CIVIL PROCEDURE 60(c)(6), 16 ARIZONA REVISED STATUTES

MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC.

On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake; inadvertence; surprise; excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment or order was entered or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant served by publication as provided by Rule 59(j) or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief

from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

The facts of this case are somewhat set forth in the Findings of Facts and Conclusions of Law by the U.S. Bankruptcy Court For the Northern District of Texas, Lubbock Division and the Arizona Superior Court's Third Amended Decree of Dissolution, Nunc Pro Tunc, both of which are attached to the Appendix of the Petition filed herein. Because the Petitioner's factual recitation of the case is inaccurate, incomplete and misleading, Respondent has included her own Statement of the Case.

On July 13, 1987 after a trial in this matter, the Superior Court of the State of Arizona for Cochise County entered a Decree of Dissolution, which divided community assets and liabilities. Specifically, in paragraph 12, the Court awarded the two retirement plans of Petitioner (military and civil service) to him and created a $75,000.00 unsecured promissory note to be paid by Petitioner to his ex-spouse over a period of fifteen (15) years with interest at nine percent (9%) per year, to reflect Respondent's community interest in such retirement plans.

Respondent appealed the above decision alleging that it was improper to divide the retirement plans in the above manner for various reasons, including the fact that it left her without remedy in the event Petitioner later filed bankruptcy and discharged such unsecured note.

On January 26, 1988 the Arizona Court of Appeals ruled that no abuse of discretion had occurred as to the division of retirement; that the trial court was not required to take into account every *speculative* possibility (such as a future bankruptcy); and in any event Respondent's interest was "protected" by the trial court's requirement that Petitioner obtain a life insurance policy which "guaranteed" Respondent would receive the $75,000.00 sum. (Opinion at page A-6, Petition for Writ of Certiorari)

Petitioner had threatened Respondent all through the dissolution proceedings that it was his intent to file bankruptcy and discharge any money the Court ruled he owed her. Although he started making payments under the above promissory note in the amount of $760.00 per month, such payments stopped in February, 1989.

In October, 1988, Petitioner moved to Lubbock, Texas and on April 5, 1989 filed for protection under Chapter 7 of Title 11, U.S. Code (Bankruptcy).

Petitioner's bankruptcy petition reflected $72,066.97 of unsecured debt, $70,510.20 of which was owed to Respondent. Assets were reported at over $300,000.00. Petitioner reaffirmed all secured and unsecured debts including debts for his house, car, debt to Sears and a debt to W.A. Wilkins for a washer and dryer. The *only* debt that was discharged was the unsecured promissory note to Respondent.

Respondent travelled to Texas, retained counsel and filed an Adversary Proceeding challenging the dischargeability of the debt owed to her. The Bankruptcy Court found the claim to be dischargeable in bankruptcy.

Citing heavily from the Arizona Court of Appeals decision, the Bankruptcy Court found that out of fourteen factors to determine if the debt was actually spousal maintenance or property equalization, seven (7) factors indicated payment was spousal maintenance, six-(6) indicated property equalization and one (l) was unknown. Nonetheless, the Court ruled on March 19, 1990 that the debt was dischargeable. (Page A-29, Petition for Writ filed herein)

Respondent filed a Motion to Reconsider with the Bankruptcy Court which was denied on April 16, 1990.

Respondent is, and was, not employed due to back problems and is receiving social security payments in the approximate amount of $189.00 per month as her sole source of income.

Petitioner has in the past cancelled his life insurance policy in the amount of $75,000.00, which named Respondent as beneficiary but now claims to have replaced the insurance policy with a new policy. No proof of such policy's *current* status was ever provided to Respondent.

Petitioner refuses to name Respondent as a beneficiary under his Survivor Benefit Plan pursuant to the Uniform Services Former Spouses Protection Act, 10 U.S.C. Section 1408 and in fact has named his new spouse as such beneficiary.

On November 23, 1992 in the trial court, at the Order to Show Cause hearing of this matter, the following findings of facts were determined by such court:

a. Respondent did not file a Petition for Review to the Arizona Supreme Court from a decision of the Court

of Appeals, Division II in the original dissolution proceeding based on advice from her counsel as to the probability of success and the lack of funds available to her to pay legal fees and costs.

b. Petitioner moved to Texas in late 1988 and stopped making the required $760.70 monthly payment which was required by Paragraph 12 of the Decree of Dissolution after his February, 1989 payment. As of November, 1992 Petitioner's missed payments equal $34,231.50.

c. In April, 1989 Petitioner filed for bankruptcy in Texas, in which he "reaffirmed" or continued to pay all debts to every creditor, except Respondent, including his mortgage, his car loan, his debt to Sears for a refrigerator, and his debt to W.D. Wilkins for a washer and dryer. He also listed $301,093.00 worth of real and personal property, which he was allowed to keep through the bankruptcy. The only debt discharged was the $70,510.20 owed to Respondent.

d. After Respondent's attempts to challenge the dischargeability of the debt owed to her by Petitioner had failed, she was advised by her Texas attorney that an appeal of the issue of whether the money owed was a debt from the property division in the decree or spousal maintenance would be futile and expensive. She decided not to appeal the Bankruptcy Court's decision but rather conserve her funds to provide for her monthly living expenses.

e. Currently, Respondent receives $189.00 per month in social security and has monthly expenses of approximately $957.00.

f. Petitioner continues to receive 100% of both his Military and Civil Service retirements and has named his new spouse as the beneficiary under the Survivor Benefit Plan. He further claims that such designation is not changeable and that he will not voluntarily request Respondent be also designated under such plan.

g. That the discharge in bankruptcy received by Petitioner rendered meaningless the trial court's equitable division of community property and therefore provided an equitable reason to allow the reopening of the previous decree pursuant to Rule 60(c)(6) Arizona Rules of Civil Procedure and A.R.S. Section 25-327(A).

h. That the Respondent has been left in the "dire financial condition" as found by the Bankruptcy Court and without any ability to seek spousal maintenance from Petitioner.

i. That if these same circumstances had been presented at the time of the trial of this matter, Respondent would certainly have qualified for a substantial award of spousal maintenance.

j. The trial court concluded that Respondent's requested relief from the Decree of Dissolution does not upset the decisions previously made by the Arizona Court of Appeals nor the Bankruptcy Court; and Appellant's argument of *res judicata* does not apply.

k. Petitioner's unilateral and voluntary action in seeking to discharge his obligation to Respondent justifies the application of A.R.S. Section 25-327(A) and Rule 60(c)(6), Arizona Rules of Civil Procedure.

1. That Respondent had timely brought her motion to reopen/amend the decree based on the chronology of events, together with her financial ability to litigate such an action; and further that the Petitioner has suffered no legal prejudice from any delay in filing this action by Respondent, in fact he has benefitted financially in that months of payments which were ordered by the trial court were not made and which Respondent ***cannot*** recover under the discharged promissory note.

REASONS FOR DENYING WRIT

A. PETITIONER HAS FAILED TO RAISE FEDERAL QUESTION IN ARIZONA COURT PROCEEDINGS.

At no time, in any Arizona proceeding, did Petitioner raise the constitutional issue of Full Faith and Credit. No reference is made in the Petition herein specifying the stage in the proceeding, either in the trial court or appellate courts, at which the federal questions sought to be reviewed were raised by Petitioner as required by Rule 14(h), Rules of the U.S. Supreme Court. No record or summary thereof is provided nor specific references to the places in the record where such matter appears. Petitioner will be quick to point out that he did raise the issue of *res judicata*, but such legal principle on its own does not give rise to the requisite federal question which would give this Court jurisdiction to review the judgments of the Arizona Courts.

Petitioner's *res judicata* arguments were duly considered and rejected by the trial court, the Arizona Court of

Appeals and the Arizona Supreme Court for reasons set forth below, nonetheless, no federal issue has been presented to such courts by Petitioner.

B. THE TRIAL COURT WAS FREE TO MODIFY THE DIVISION OF PETITIONER'S RETIREMENT PROGRAMS IN LIGHT OF ITS PREVIOUS RULINGS AND OTHER COURTS' ORDERS INCLUDING THE BANKRUPTCY COURT'S RULING ON DISCHARGEABILITY.

Although Petitioner fails to cite 28 U.S.C. Section 1238, which implements U.S. Constitution Article 4 Section 1, it is clear that a state court must accord full faith and credit to a judgment of a federal court. *Stoll v. Gottlieb*, 305 U.S. 165, 170, 59 S.Ct. 134, 136-37, 83 L.Ed. 104, rehearing denied, 305 U.S. 675, 59 S.Ct. 250, 83 L.Ed. 437 (1938); No. 1 BJ. Moore, Federal Practice, Section 0.406 [1], at 266-67 n.7 (1991)

It is equally clear that the judgments of bankruptcy courts are preclusive only if there is: (1) a final judgment on the merits in an earlier action; (2) an *identity* of the cause of action in both the earlier and later suits; and (3) an identity of parties or privies in the two suits. *Kale v. Combines Ins. Co. of Am.*, 924 F.2d 1161, 1165 (1st Cir) cert. denied, ___ U.S. ___, 112 S.Ct. 69, 116, L.Ed.2d 44 (1991).

Additionally, it is well recognized that the bankruptcy court may not have exclusive jurisdiction of every issue. The state trial court often has subject matter jurisdiction over certain claims, especially after the bankruptcy case has been closed with no expressed retained jurisdiction. See *In re Talandis*, 95 B.R. 108, 109 (Bankr.

S.D. Iowa, 1989) (Bankruptcy court lacks jurisdiction to consider professional fee application after dismissal of Chapter 11 case). See also, *Woodley v. Myers Capital Corp.*, 67 Wash.App. 328, 835 P.2d 239, 243 (Wash.App. 1992).

In the present case, there is no argument that there was a final judgment on the merits from the U.S. Bankruptcy Court, Northern District of Texas, Lubbock Division which found that the unsecured $75,000.00 promissory note ordered by the Arizona Superior Court to be paid by Petitioner to Respondent was discharged. Nor is there any doubt as to the identity of the parties involved in obtaining such judgment, however, there is substantial issue as to whether the Arizona court's later modification of a decree of dissolution pursuant to Arizona law is the identity of cause which Petitioner claims.

With "tongue-in-cheek" Petitioner alludes to the fact that Respondent should have made her equity interest in Petitioner's retirement known to the U.S. Bankruptcy Court in Texas, knowing full well that such court would have *no* authority to *modify* an Arizona dissolution decree and the community property rights set forth therein.

The fact of the matter is simply; the Bankruptcy Court was called upon to decide a rather narrow issue, was the $75,000.00 unsecured promissory note ordered by the trial court, in the nature of spousal maintenance (and therefore not dischargeable) or a portion of the property division (and thereby dischargeable). Although from the Findings of Fact and Conclusions of Law Nos. 10, 11 and 12 contained in the Third Amended Decree of Dissolution (page A47, Petition for Writ of Certiorari) it could be argued that the Bankruptcy Court misread the Arizona

Court's intentions, the fact remains, a discharge was granted. Respondent nor the Arizona Courts do not challenge such ruling but rather give it the Full Faith and Credit as required by law. In the trial Court's ruling, specific mention was given to the fact that Respondent **may not** attempt to collect any missed payments from the discharged promissory note.

C. ARIZONA COURTS RETAIN JURISDICTION

Petitioner concedes that the Arizona trial court retained jurisdiction over the subject matter of the dissolution of the parties, Arizona Revised Statutes Section 25-327, but claims such jurisdiction is limited somehow by the Bankruptcy Court's dischargeability decision as to the $75,000.00 unsecured promissory note.

In Petitioner's Opening Brief to the Arizona Court of Appeals, a citation was made to the Uniformed Services Former Spouses Protection Act, 10 U.S.C. Sec. 1408(c)(1) and the following quotes were made:

> " . . . Appellee's [Petitioner herein] discharge in bankruptcy has not entirely divested [Respondent] of her share of the community property interest in [Petitioner's] retirement benefits, but has only altered the timing of the receipt of those benefits and modified the formula." (pages 8-9)
>
> " . . . A subsequent modification of a *final judgment* through an adjudicated discharge in bankruptcy cannot serve as a legal basis to reopen this judgment, particularly where such a bankruptcy discharge has not divested [Respondent] of her community property interest in JOE's

> retirement benefits, but only altered the timing of her receipt of those benefits." (page 12)

It is clear that on one hand, Petitioner must recognize the power granted to the State Courts through Federal Statute to apply that state's community property laws to federal retired pay [10 U.S.C. 1408 (c)(1)] but on the other hand, he argues that the state's power is restricted by the *bankruptcy court's modification* of the state dissolution decree. If taken to its logical conclusion, Petitioner's position is that the U.S. Bankruptcy Court for the Northern District of Texas has the subject matter jurisdiction to amend the parties' Arizona Decree of Dissolution and at the same time, the power to prevent the Arizona Court from exercising its reserved statutory jurisdiction to modify property settlements. Such reasoning is not based in the law or fact.

The Arizona trial court gave full faith and credit to the bankruptcy court's decision and specifically held that such discharge of *that* particular debt was correct and pursuant to law as reasoned by the Bankruptcy Court. (Findings of Fact and Conclusion of Law). Nonetheless, the equitable reasons to allow the reopening of the previous decree existed pursuant to Rule 60(c)(6), Arizona Rules of Civil Procedure and A.R.S. Section 25-327(A) and based on Respondent's "dire financial condition" as found by both the Bankruptcy Court and the Arizona trial court. Such finding mandated a modification of the decree to award Respondent directly her community property interest in the retirement programs.

Arizona law regarding reopening of property settlements is primarily intended to allow relief from judgments that, although perhaps legally faultless, are unjust because of extraordinary circumstances that cannot be remedied by legal review. *Tippit v. Lahr*, 132 Ariz. 406, 408-9, 646 P.2d 291 (App. 1982) The trial court specifically found that Petitioner's unilateral and voluntary action justified the relief sought by Respondent (page A-52, Petition for Writ of Certiorari, No. 15)

D. BANKRUPTCY COURT'S DECISION HAS NO BEARING ON DIVISION OF COMMUNITY PROPERTY

It is clear that postpetition obligations of Petitioner are not affected by his discharge in bankruptcy. See, *In Re Hanna*, 872 F.2d 829 (8th Cir. 1989) (Postpetition interest on unpaid federal and state taxes are not dischargeable).

Although Petitioner has cited three bankruptcy decisions, all from states which do not recognize community property rights of spouses, for the proposition that Respondent's interest in the retirement programs cannot be awarded, he has failed to provide the majority view from states where community property rights are protected by law.

The Ninth Circuit Court of Appeals held in *In Re Teichman*, 774 F.2d 1395 (1985) that postpetition payments of retirement benefits to an ex-spouse were not "debts" and thus not subject to discharge. Mr. Teichman argued, just as Petitioner is in the present case, that his obligation to pay retirement benefits was created in the property

settlement and therefore the ***entire*** obligation was prepetition debt. The court rejected such argument and clearly stated that the ex-spouse had an ownership interest in the retirement fund by reason of the divorce proceedings and therefore debtor's postpetition obligations are ***not*** debts under the Bankruptcy Code, *Id.* at 1398.

The court did go on to find no trust had been established for prepetition payments withheld by the debtor and not paid to his ex-spouse when due, and therefore granted a discharge as to those specific payments.

In the present case, no attempt has been made by Respondent to collect prepetition payments due under the Third Amended Decree, Nunc Pro Tunc. The entire focus of Respondent's efforts have been to establish her right, with the payors of Petitioner's federal retirement programs, to receive her community property share of each monthly payment. Petitioner has responded by taking every possible appeal route, including the present Writ to ensure a substantial delay in the proper division of the retirement benefits.

The Eighth Circuit Court of Appeals in *Bush v. Taylor*, 912 F.2d 989 (8th Cir. 1990), although citing *Teichman*, supra, went one step further in finding a constructive trust relationship and thus both prepetition and postpetition payments owed to the former spouse by debtor were not discharged in bankruptcy. *Id.* at 993 The court went so far as to say,

> "Taylor's obligation, Bush concedes, was not for alimony, maintenance, or support. At the same time, we have difficulty viewing it as a property settlement within the meaning of the Code,

> since in reality it appears to have been nothing more than a division of property required by the law of community property that obtains in the State of Washington" *Id.* at 993.

The *Bush* court cited both the Employee Retirement Income Security Act (ERISA) 29 U.S.C. Sections 988 and 1056(d)(1) and the Uniformed Services Former Spouses Protection Act of 1982, 10 U.S.C. Section 1408 as examples of Congress' intent not to allow a debtor, such as Petitioner herein, to use the Bankruptcy Code to strip ex-spouses of community property, citing *Mackey v. Lanier Collections Agency & Serv.*, 486 U.S. 825, 838, 108 S.Ct. 2182, 2190, 100 L.Ed.2d 836 (1988) (" . . . to guarantee that the Nation's private retirement income system provided fair treatment for women.") and *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 110 S.Ct. 680, 687 (1990) [FN 18, "importance of protecting a stream of income for pensioners"].

The court emphatically stated,

> "We doubt that Congress ever intended that a former wife's judicially decreed sole and separate property interest in a pension payable to her former husband should be subservient to the Bankruptcy Code's goal of giving the debtor a fresh start." *Id.* at 994

It is of interest to note that if the current Third Amended Decree, Nunc Pro Tunc, was now submitted to the Circuit Court of Appeals for the Bankruptcy Court herein (5th Circuit), that court would find that debtor could not discharge in a Chapter 7 case that portion of the monthly retirement benefits awarded to his ex-wife. *In Re Chandler*, 805 F.2d 555, 557 (1986)

In retrospect, the simple solution to this entire matter would have been for the original court to simply divide the retirement benefit as it did in the Nunc Pro Tunc Decree, as requested by the Respondent in 1987. Respondent has done everything in her power to pursue her statutory rights to retirement benefits. In fairness to the trial court, the status of the law in Arizona in 1987 as to the division of retirement was in great flux. Now settled, a majority of retirement benefits are divided just as Respondent's current Third Amended Decree provide. The issue of prepetition versus postpetition payments owed to Respondent has not been litigated and is therefore not ripe for ***any*** judicial review.

In courts which have considered the issue, it is clearly the majority view that Respondent's interest in the retirement programs cannot be divested through Petitioner's Chapter 7 bankruptcy. *In Re Drennan*, 161 B.R. 661 (Bankr. E.D. Ark. 1993); *In re Potter*, 159 B.R. 672 (Bankr. N.D. N.Y. 1993); and *In re Wilson*, 158 B.R. 709 (Bankr. S.D. Ohio 1993); *In Re Sommerville*, 122 B.R. 446 (Bankr. M.D. Ala. 1990); *Matter of Newcomb*, 151 B.R. 287 (Bankr. M.D. Fla. 1993); *Matter of Sadowski*, 144 B.R. 566 (Bankr. M.D. Ga. 1992); *In Re Long*, 148 B.R. 904 (Bankr. W.D. Mo. 1992); *In Re Fristoe*, 151 B.R. 81 (Bankr. W.D. Va. 1993); *In re Zrubek*, 149 B.R. 631 (Bankr. D. Mont. 1993).

CONCLUSION

For all the reasons previously stated, this case presents no issue appropriate for the exercise of this court's jurisdiction. Accordingly, the Petition for Writ of Certiorari should be denied.

ELLEDGE & IRWIN, P.C.
CHARLES A. IRWIN
Attorney of Record
For Respondent

APPENDIX

10 U.S.C. SEC. 1408(a) through (c) (UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT)

§ 1408. Payment of retired or retainer pay in compliance with court orders

(a) Definitions. – In this section:

(1) The term "Court" means –

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which –

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for –

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeal under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such members retired pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 1331 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term "retired pay" includes retainer pay.

(b) **Effective service of process.** – For the purposes of this section –

(1) service of a court order is effective if

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (i) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) The court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) Authority for court to treat retired pay as property of the member and spouse. –

(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a decree of divorce, dissolution, annulment, or

legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.